STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2004
v	No. 247776 Wayne Circuit Court
EDWARD OLSZEWSKI, Defendant-Appellant.	LC No. 02-011956-01

Before: Zahra, P.J., White and Donofrio, JJ.

PER CURIAM.

Defendant was charged with four counts of sodomy, MCL 750.158; and four counts of indecent liberties with a child under the age of sixteen, former MCL 750.336;[1] for conduct that occurred approximately thirty years earlier. Following a jury trial, defendant was convicted of four counts of indecent liberties with a child under the age of sixteen. The trial court sentenced him to three years' probation. Defendant appeals as of right. We remand for an evidentiary hearing on defendant's claim of juror misconduct, but affirm in all other respects.

I. Underlying Facts

Defendant, aged seventy at the time of trial, is a Catholic priest. His convictions arise from allegations that he sexually abused the complainant, a former altar boy, over a three-year period beginning in 1971.[2] During that time, the complainant allegedly resided with defendant at the St. Cecelia Catholic Church rectory in Detroit.[3] The complainant indicated that defendant was his caregiver, whom he called "Father Ed" publicly, but referred to as "dad" privately. The complainant testified that defendant sexually assaulted him throughout the duration of his stay at the rectory. At trial, he claimed that the first incident, which involved inappropriate touching

[1] This statute was repealed by 1974 PA 266, in conjunction with adoption of the criminal sexual conduct code, MCL 750.520b *et seq*.

[2] The complainant testified that he was born in 1958, and was forty-four years old at the time of trial.

[3] There was conflicting testimony regarding how long the complainant actually resided at the rectory.

and oral sex, occurred on his first night at the rectory, and that the first incident of anal sex occurred within his first week at the rectory. The complainant alleged that the sexual acts between him and defendant continued sporadically until their relationship ended in 2000. In March 2002, the complainant reported the incidents to the police. The defense refuted the allegations of sexual abuse and asserted, inter alia, that the complainant had falsely accused defendant because defendant refused his requests for money.

II. Juror Misconduct

A. Standard of Review

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion exists when the trial court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Otherwise stated, an abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

B. Analysis

Defendant argues that the trial court abused its discretion in denying his motion for a new trial or, in the alternative, an evidentiary hearing based on juror misconduct. Defendant's claim of juror misconduct is based upon affidavits from two jurors that both aver that another juror (Juror 7), who denied during voir dire that she had been a victim of a sexual assault, informed the jury during deliberations that she had in fact been the victim of sexual abuse.

MCR 2.611(A)(1)(b) provides in pertinent that a "new trial may be granted . . . whenever [] substantial rights are materially affected," because of "misconduct of the jury . . ." "To be entitled to a new trial on the basis of juror misconduct, defendant must "establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *Crear, supra* citing *People v Daoust,* 228 Mich App 1, 9; 577 NW2d 179 (1998).[4] See generally *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948) (new trial required where two jurors did not disclose when asked that each had a family member that had

[4] This rule does not address circumstances in which it is discovered that one of the jurors has lied during voir dire. *Daoust, supra*. at 9 n 3. To that end, it has been suggested that, "if a juror, during voir dire, purposefully withholds information relevant to whether that juror could act impartially, a defendant need not show prejudice or that the juror could be challenged for cause under the court rules in order to receive a new trial." *People v Johnson*, 245 Mich App 243, 267; 631 NW2d 1 (2001) (Whitbeck, J., dissenting). Yet, the Sixth Circuit has only recognized that, "[i]f a juror is found to have deliberately concealed material information, bias *may* be inferred. . . . *United States v Patrick*, 965 F2d 1390, 1399 ([CA 6,] 1992) (emphasis added), *citing Cunningham v Sears, Roebuck & Co.*, 854 F2d 914, 916 ([CA 6,] 1988)." *Zerka v Green*, 49 F2d 1181, 1186 (CA 6, 1995). Regardless, we need not resolve this question before it is established that Juror 7 deliberately concealed material information during voir dire.

been sentenced to life imprisonment for a similar offense) and *Johnson*, *supra* (juror's failure to reveal that she had been a domestic violence victim did not warrant new trial because juror did truthfully reveal she had been the victim of assault, and defense counsel could have discovered her history as victim through further discovery).

The record reflects that during voir dire, the trial court[5] asked the prospective jurors, "[h]ave any of you or anyone close to you been a victim of a sexual assault?" Juror 7 did not respond to the trial court's question. Attached to defendant's motion for a new trial, or an evidentiary hearing, were two affidavits from two jurors who sat on defendant's jury. One juror averred that, during deliberations, Juror 7 "became visibly upset and informed jurors that she had been molested." The other juror averred that, during deliberations, Juror 7 "informed [her] and the other jurors that she had been sexually molested." The trial court, without conducting an evidentiary hearing, denied defendant's motion concluding that "[d]efendant has presented no evidence that [Juror 7] would have been excused for cause," because there is no evidence that [Juror 7] ever said that she couldn't be fair for whatever reason." Further, the trial court held that "a verdict may not be impeached by that which occurred during deliberations."

Initially, we must address the trial court's holding that "a verdict may not be impeached by that which occurred during deliberations." We agree with the trial court and the prosecution that generally "jurors may not impeach their verdicts by affidavits[,] as "'[t]o permit this would open the door for tampering with the jury subsequent to the return of their verdict.'" *People v Graham*, 84 Mich App 663, 665-666; 270 NW2d 673 (1978), quoting *People v Pizzino*, 313 Mich 97, 105; 20 N.W.2d 824, 827 (1945). However, the trial court's holding fails to recognize the basis for defendant's claim:

> It is proper and appropriate to grant a new trial when affidavits or testimony are presented confirming that matters have been falsely denied or concealed on voir dire, if these matters would establish the juror's incompetency or disqualification or would lead the parties to challenge him or her and if the affidavits are not proffered to show misconduct of a juror or jury for the purpose of impeaching their verdict. *Graham*, *supra* at 666-667, citing *Grist v Upjohn Co*, 16 Mich App 452, 168 NW2d 389 (1969).

Here, defendant is not arguing that Juror 7's statements to other jurors during deliberations concerning her previous experience with sexual abuse affected the verdict, but rather to establish that Juror 7 was incompetent or that she would have been excused for cause. Thus, defendant is not offering the affidavits to impeach the verdict, but only to establish his claim that he was denied a fair and impartial jury.

Regarding the merits, defendant maintains that, (1) Juror 7 deliberately concealed material information; (2) defendant was actually prejudiced by the presence of Juror 7 given that Juror 7 attempted to use her experience as a victim of a sexual assault to influence the remaining jurors; or (3) that juror 7 was properly excusable for cause. The affidavits that defendant

[5] A different judge presided over voir dire than at trial.

submitted provide plausible support for defendant's claim that he was denied an impartial and fair jury. See *People v Manser*, 250 Mich App 21, 28; 645 NW2d 65 (2002) (reversal required where trial court did not remove for cause juror that failed to disclose during voir dire that she had been a victim of sexual abuse). Because defendant has presented a potentially meritorious issue that is supported by an offer of proof which, if properly established, might warrant a new trial, the trial court abused its discretion in denying defendant's motion without conducting an evidentiary hearing.

Contrary to defendant's claim that reversal is required, the proper remedy is to remand for an evidentiary hearing. See *People v Kage*, 439 Mich 1022; 486 NW2d 667 (1992). Here, the record is insufficient to determine whether Juror 7 was excusable for cause or whether defendant was actually prejudiced by the juror's presence on the jury. Accordingly, we remand this case for an evidentiary hearing in which defendant may present evidence in regard to whether (1) he was actually prejudiced by the presence of the juror in question or (2) the juror was properly excusable for cause. *Crear*, *supra* citing *Daoust*, *supra* at 9.

III. Newly Discovered Evidence

Next, defendant argues that the trial court abused its discretion by denying his motion for a new trial based on newly discovered evidence. We disagree.

The complainant testified at trial that the sexual acts began on his first night at the rectory. On appeal, defendant maintains that a newly discovered witness, who was at the rectory on that night, could testify that nothing inappropriate occurred between defendant and the complainant. The new witness averred in an affidavit that, in 1971, his family lived next door to the rectory and that he often helped defendant with "odd jobs." The witness, who was eighteen in 1971, stated that he "spent the day and evening with the boys" and "was there til [sic] about 4:00 a.m. the next day." According to the witness, the complainant "was not molested on the first day or night he was at the rectory," and "the boys were not alone with [defendant] at any time on the first day or night at the rectory." The witness also claimed that, contrary to the complainant's testimony, the boys returned from their showers fully clothed and, most of the time, defendant was not present. Additionally, he stated that defendant was not a "cuddly Father," and "would remove" any child that "crawled on his lap." The witness also never observed any sexual improprieties or the complainant sleeping in defendant's bed.

In order to merit a new trial based on newly discovered evidence, a defendant must demonstrate that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) the defendant, exercising reasonable diligence, could not have discovered and produced the evidence at trial; and, (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citation omitted); see also *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

In denying defendant's motion, the trial court found that the proffered evidence is "cumulative to the testimony of the other witnesses, and . . . would [not] make acquittal probable."

Defendant argues that the newly discovered witness' testimony is not cumulative to other witnesses' testimony because he is the only living non-prosecution witness that was present at the rectory on the day that the complainant arrived. Further, defendant avers that this witness can confirm or deny the allegations that defendant (1) watched the complainant dry off after showers, (2) sat the complainant on his lap, and (3) slept with the complainant in defendant's bed.

The defense presented eleven witnesses who vehemently challenged the claim that defendant sexually assaulted the complainant or any child. The defense presented two witnesses who worked in the rectory during the relevant time period and contradicted parts of the complainant's testimony. The rectory housekeeper testified that, contrary to the complainant's testimony, the complainant only lived at the rectory for two or three months, as opposed to three years. She also maintained that, contrary to the complainant's claims, defendant did not have a television or Vaseline in his room, the complainant slept in his own bed, defendant did not drink alcohol, and defendant never touched any child in an inappropriate manner. The rectory cook likewise testified that the complainant only lived there for five months, that defendant did not drink alcohol, that defendant did not favor the complainant as he claimed, and that defendant never acted in a sexually inappropriate manner with any child, including the complainant. In addition to the rectory workers, the defense presented the former church police officer and sports coach from 1969 to 1974, who testified that he never saw defendant "touch, molest, or bother any kid inappropriately."

The defense also presented two witnesses who actually resided at the rectory during the pertinent time period, whose testimony contradicted parts of the complainant's testimony. A Catholic priest, who lived in the rectory for two months in 1971 testified that defendant did not drink alcohol, did not take weekend trips, did not have a television in his room, never acted improperly with children, and had a "very good" reputation for honesty. He never saw the complainant sleep in defendant's bed, defendant give the complainant preferential treatment, or any children uncovered after their showers. A teenager, who resided in the rectory for five months in 1971 testified that he never observed the complainant sleep in defendant's bed, any unclothed children, any sexual improprieties, and no indication of any sexual interaction between defendant and the complainant.

Initially, we note defendant's claim fails to recognize that the Information charged that defendant sexually assaulted the complainant over the course of three years, not simply on the first night. In other words, the newly discovered witness' proposed testimony, which merely contradicts the complainant's testimony regarding when the sexual acts began, is not dispositive of other later acts of sexual conduct. Further, we agree with the trial court that, in light of all of the defense testimony presented at trial, defendant has failed to demonstrate that the newly discovered evidence is not merely cumulative. As shown above, there were several witnesses that testified that they had never seen defendant observe naked children, allow children to sit in his lap or sleep in his bed. Moreover, it is unlikely that this newly discovered witness' testimony would have caused the jury discredit the complainant's testimony where the jury did not discredit it at trial despite that the testimony of the many defense witnesses contradicted complainant's testimony. Therefore, the trial court did not abuse its discretion in denying defendant's motion.

IV. Statute of Limitations

We reject defendant's claim that his prosecution was barred by the statute of limitations. Defendant was charged with four counts of indecent liberties with a child, contrary to former MCL 750.336. The statute was repealed by 1974 PA 266, in conjunction with the adoption of the current criminal sexual conduct statutes. Defendant does not dispute that the savings clause of the new act, 1974 PA 266, § 2, allows for prosecutions under the former statute for conduct committed before the statute was repealed. Defendant argues, however, that his prosecution for the charged offenses was time-barred under the applicable six-year statute of limitations, MCL 767.24, and that the trial court erred by applying the nonresident tolling provision of the statute to conclude that the six-year period was tolled during the time that he resided in Florida. Although defendant admits that he moved to Florida in 1976, he argues that it is "fundamentally unfair" to toll the limitation period because he was residing openly in Florida, the complainant knew his whereabouts, and he did not leave the state to avoid prosecution.

This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). Statutory interpretation presents a question of law that this Court reviews de novo. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *People v Sessions*, 262 Mich App 80, 84; 684 NW2d 371 (2004) (citation omitted). "If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted." *Id*.

The charged offenses occurred in 1971-1973, and the complainant reported the offenses in 2002. It is undisputed that a six-year statute of limitations, MCL 767.24, applies to this case. The plain and unambiguous language of the statute provides that the limitation period is tolled for "[a]ny period during which the party charged did not usually and publicly reside within this state . . . ." MCL 767.24. The tolling provision applies only when a suspect is no longer a resident of Michigan, not just when the suspect is absent from this state. *Crear, supra*. Defendant admits that he transferred to Florida and left Michigan in 1976, and resided there continuously until he was charged in this case. Because there is no dispute that defendant had not usually and publicly resided in Michigan since 1976, the trial court did not err in concluding that the period of limitations was tolled and, consequently, that the charges in this case were timely filed.

V. Ineffective Assistance of Counsel

Next, defendant argues that defense counsel was ineffective when he agreed to the trial court's decision to instruct the jury that a not guilty plea is not testimony. We disagree.

During deliberations, the jury sent out a note asking, "Is the plea of not guilty from the defendant considered testimony?" After discussing the matter with defense counsel and the prosecutor, and both agreeing, the trial court sent back a note simply stating, "No." After the verdict, defendant moved for a new trial, arguing that the trial court's response to the jury's inquiry was incorrect because it removed the presumption of innocence. After the trial court denied defendant's motion for the reason that the parties had agreed to the response given, defendant again moved for a new trial, this time arguing that defense counsel was ineffective for agreeing to the trial court's response. The trial court again denied defendant's motion, concluding that it "answered the question correctly," "[t]he answer did not effect the presumption of innocence," and the motion was "frivolous."

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Initially, defendant has failed to offer any authority in support of his position that his "not guilty plea" constituted "testimony." An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, or give an issue cursory treatment with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Therefore, defendant has failed to show that the trial court's response, and defense counsel's agreement to the response, was "erroneous." Counsel is not required to advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

To the extent defendant argues that the trial court's response removed the presumption of innocence, we disagree. The trial court's instructions sufficiently addressed the presumption of innocence and the burden of proof. In its preliminary and final instructions, the trial court instructed the jury that defendant was presumed innocent and did not have to offer any evidence or prove his innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and that the jurors were the sole judges of the witnesses' credibility. The trial court also instructed the jury that the Information charging defendant with the offenses was not evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Furthermore, defendant has failed to demonstrate that he was prejudiced by the trial court's response to the jury's note. The defense maintained defendant's innocence throughout the proceedings, and there was no question that defendant vehemently denied the complainant's allegations. The defense presented numerous witnesses, who consistently testified in support of defendant's innocence and sterling character for honestly and morality. Also, defense counsel vigorously and extensively cross-examined the complainant about the alleged sexual offenses, his motivations for testifying untruthfully, and the inconsistencies in his testimony. In light of this record, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *Effinger*, *supra*. Defendant is not entitled to a new trial on this basis.

VI. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely

instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US __; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Appeals to the Jury's Sympathy

Defendant claims that, during opening statement, the prosecutor impermissibly appealed to the jury's sympathy by suggesting that the complainant was the "underdog" when she asked, "[I]s the chance for justice just open to people with titles, people with power and prestige, people with powerful friends?"

Opening statement is the appropriate time to state a fact that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). However, appeals to the jury to sympathize with the victim are improper. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Although the challenged remark bordered on argument, in the context of the complete opening statement, it was not a blatant appeal to the jury's sympathy, did not suggest that the jury should convict defendant on the basis of sympathy, was isolated, and was not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Moreover, to the extent that the challenged remark could be viewed as improper, the trial court's instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

B. Denigration of Defense Counsel

Defendant next argues that, throughout trial, the prosecutor frequently made comments that denigrated defense counsel and thereby prejudiced him.

A prosecutor may not personally attack the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). The jury's focus must remain on the evidence, and not be shifted to the attorney's personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

We disagree with defendant's claim that the prosecutor denigrated defense counsel during her direct examination of the complainant when she accused him of "wasting everybody's time" cataloguing photographs. The prosecutor's comment, which was in response to defense counsel's request to catalog the photographs, did not involve a personal attack on defense counsel's character. Rather, it was a cogent objection to defense counsel taking time to index the photographs during the prosecutor's direct examination of the complainant. Moreover, defense counsel aptly responded to the prosecutor's objection, and the trial court allowed him to continue logging the photographs, as requested. It is implausible that defendant was prejudiced by the prosecutor's comment.

Defendant also argues that, during defense counsel's cross-examination of the complainant, the prosecutor denigrated him by stating, "Counsel has got to craft better questions," and "Judge, [defense counsel] should have had his defense figured out before now."

The prosecutor's comments did not constitute a personal attack on defense counsel's character, or shift the jury's focus from the evidence to defense counsel's personality. Rather, both comments were a part of forceful objections during defense counsel's cross-examination of the complainant. In the first instance, defense counsel had asked the complainant several unclear questions before the prosecutor made the comment. In the second instance, the prosecutor's comment was a fair response to defense counsel's request to ask a particular question to discover additional evidence. In other words, the prosecutor's comment was that defense counsel should have already known what evidence he planned to present to the jury. Considering that the two remarks drew no objection on the basis asserted here, and were made during a vigorous adversarial proceeding, defendant's claim that they amounted to an improper personal attack on defense counsel's personality is without merit. *Phillips, supra*.

Next, defendant argues that the prosecutor denigrated defense counsel and effectively "diluted the presumption of innocence" when she made the following emphasized remarks at the outset of her closing argument:

> When I sat here and I listened to the case, and I listened to the testimony, and bearing in mind all of the Constitutional principles: that the defendant is presumed to be innocent, and he has no burden, I asked myself, *for somebody who has no burden, he's workin' [sic] mighty hard to prove that [the complainant] is a liar*. Think about it for a moment. If [the complainant] was so incredible, if nobody could believe [the complainant], if [the complainant] was such a liar, *you wouldn't have to parade in witness, after witness, after witness*, to say what a great guy the defendant is. It wouldn't be necessary, because intelligent people can see that [the complainant] is lying. Because that's the defense, that [the complainant] is lying. [Emphasis added.]

Defendant claims that the prosecutor continued to dilute the presumption of innocence when she made the following emphasized comments during rebuttal argument:

> He said there was never any evidence about people parading around naked. But [the complainant's brother] didn't say they paraded around naked. See, you have to be very careful. *And if your client is innocent, why do you have to mischaracterize things?* He indicated, [the complainant's brother] indicated that, "When we would take baths or showers, [defendant] would make us come out of the bathroom," which was in his bedroom, "and dry off in front of him." He never said anything about them parading around naked. So, for counsel to sit up here and argue that, he's mischaracterizing and misleading. *And if your client is innocent, you don't have to mislead*. [Emphasis added.]

Contrary to what defendant argues, the prosecutor's remarks did not suggest that defendant should not be presumed innocent. Rather, viewed in context, the prosecutor's remarks were focused on refuting defense counsel's claims made throughout trial that the complainant was a liar. For instance, during closing argument, defense counsel stated that the complainant

was a liar, had "delusions of grandeur" and "fantasized" about his relationship with defendant. He further stated:

> But, first of all, before we get to all of [the complainant's] lies; lie, after lie, after lie, after lie, after lie, after lie, let's talk about a few other things.

Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Moreover, to the extent that the challenged comments were improper, the trial court's instructions that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, were sufficient to dispel any prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.

C. Arguing Facts Not in Evidence

Defendant argues that, during the following excerpt from closing argument, the prosecutor impermissibly implied that the Catholic Church believed he was guilty:

> You don't have to accuse him, criminally, because, you know, the Catholic church - - *he could have took* [sic] *that hush money from the Catholic Church and ran. They've been paying hush money for years.* So, it's not about money. It has to be about more than any hush money from the Catholic Church because he didn't have to bring criminal charges. [Emphasis added.]

A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case. *Bahoda, supra* at 282; *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). However, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). During trial, the defense argued that the complainant falsely accused defendant to obtain money. Although the prosecutor's remarks were focused on refuting this defense, there was no evidence presented to support an inference that the Catholic Church has been paying "hush money," or that it would have paid on defendant's behalf in this case. But, as previously indicated, defendant did not object to the remark and, therefore, our review is limited to plain error affecting substantial rights. *Carines, supra*.

Viewed in the context of the complete closing argument, the prosecutor's remark did not affect defendant's substantial rights. The prosecutor's comment occurred during a lengthy discussion of the evidence, was isolated, and was not so inflammatory that defendant was prejudiced. Furthermore, the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra*. Moreover, the trial court's instructions that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury was to follow the law as instructed by the trial court were sufficient to dispel any prejudice. *Long, supra*. In sum, defendant has failed to show a plain error affecting his substantial rights. *Carines, supra*.

D. Shifting the Burden of Proof

We reject defendant's cursory claim that the prosecutor shifted the burden of proof by lodging certain objections during defense counsel's cross-examination of the complainant. Defendant asserts that the objections were improper because "the defense has no burden" and because "the prosecution should be concerned with justice and not with winning by obstruction." A prosecutor may not imply that a defendant must prove something or present a reasonable explanation, because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). But here defendant has failed to adequately explain how, under the circumstances, the prosecutor's objections on permissible evidentiary grounds shifted the burden of proof. As previously indicated, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Watson*, *supra*. In any event, what defendant characterizes as misconduct were cogent objections on grounds of relevancy and hearsay. Accordingly, this claim does not warrant reversal.

Defendant also argues that the prosecutor shifted the burden of proof when, during rebuttal, she made the following statement:

> Now defense counsel talks about doing investigation. He talks about going around and trying to find evidence. Did you hear him say: "I found court documents that prove a civil case has been filed?" No.

Although a prosecutor may not imply that a defendant must prove something, *Guenther*, *supra*, it is permissible for a prosecutor to observe that evidence against a defendant is undisputed. Additionally, although a defendant has no burden to produce any evidence, once he advances a theory, argument with regard to the inferences created does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Here, viewed in context, the prosecutor's remarks were focused on refuting the defense theory advanced during trial that the complainant had accused defendant to obtain money, and that the complainant was untruthful when asked whether he filed a civil suit. For instance, during closing argument, defense counsel stated that the complainant lied about having filed a civil suit. He also argued:

> So, he goes to see this lawyer, in Seattle, that he sees on T.V., in connection with suing the Roman Catholic Church. And he sees that lawyer the next day. *Does he go to the police? No. He goes to make some money*. That's what he does. That's where he goes. [Emphasis added.]

Additionally, as previously indicated, otherwise improper prosecutorial remarks may not require reversal if they address issues raised by defense counsel. *Duncan*, *supra*; *Simon*, *supra*. Accordingly, defendant has not shown a plain error warranting appellate relief.

E. Infringing on Defendant's Right Not to Testify

We reject defendant's final claim that the prosecutor infringed on his constitutional right to remain silent when she made the following comments during closing argument:

> The defendant, as we expected him to do, is doing what he did back in the 70's. He is hiding being [sic] the prestige of this title and his office to do what he did to [the complainant]. As a matter of fact, [a witness], when I asked him

simply a question: "Are you his friend," he was the one who said - - he talked about his title.

The prosecutor may not comment on a defendant's failure to testify because such an argument infringes on the right against self-incrimination. *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). Here, however, viewed in context, the prosecutor was simply arguing that the jury should not acquit defendant because of his stature as a priest. During trial, witnesses referred to defendant's title and his position in the community, as the prosecutor noted. Also, in addition to the cited comment, the prosecutor asked the jury to consider the evidence. Under the circumstances, the prosecutor's comments were not improper. See *Bahoda*, *supra*; *Fisher*, *supra*. Moreover, the trial court's instructions that defendant has an absolute right not to testify, and that the jury is not to consider the fact that he did not testify were sufficient to dispel any prejudice. *Long*, *supra*.

VII. Evidentiary Rulings

Defendant argues that, during his cross-examination of the complainant, the trial court made numerous evidentiary rulings that effectively denied him the right to confront the witnesses against him, and the right to a fair trial. We disagree.

This Court reviews a trial court's evidentiary rulings and limitation of cross-examination for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Sabin (After Remand)*, *supra* at 67.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by, inter alia, the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

A defendant's constitutional right to present a defense and confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski*, *supra*. The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes*, *supra*. A trial court has wide latitude to impose reasonable limits on cross-examination based on concerns such as, inter alia, prejudice, confusion of the issues, or questioning that is only marginally relevant. *Adamski*, *supra*.

Defendant has not demonstrated that the trial court's evidentiary rulings were erroneous or denied him a fair trial. Defendant argues that the proffered testimony, which the trial court precluded, was relevant to proving that the complainant was not credible, and falsely accused

defendant. But none of the testimony that defendant claims he was barred from presenting would have had a tendency to make it more probable than it would have been without the evidence that the complainant was perpetuating a lie. In particular, the proffered testimony was (1) either not relevant, MRE 401, (2) ultimately presented to the jury and, thus, cumulative, MRE 403, or (3) potentially confusing because the inference defendant was trying to draw between the proffered testimony and the complainant being untruthful was too tenuous and may have confused the issues, MRE 403.

In specific, although defense counsel was precluded from questioning the complainant about whether he disobeyed a judge's order while on probation, he was allowed to question him about his prior convictions and whether he was imprisoned for violating his probation. In response to defense counsel's inquiry, the complainant plainly testified that he was imprisoned after he violated his probation. Defense counsel was also precluded from questioning the complainant about whether his use of an alias was associated with a fantasy about being wealthy and famous. However, because the complainant testified that his alias was given to him by jail inmates, the connection that defense counsel was attempting to make regarding the complainant adopting the alias as part of a fantasy was tenuous. Also, defense counsel was permitted to question the complainant, at length, regarding the essential fact that he used an alias.

Furthermore, several of the challenged evidentiary rulings concerned defense counsel being precluded from questioning the complainant about whether he ever told his mother about the sexual acts between him and defendant or about their travels, whether anyone ever saw them or made comments to him regarding the alleged sexual acts, and whether the complainant was ever concerned about anyone seeing him and defendant together. But the complainant previously testified, and it was undisputed, that he never told anyone, including his mother, about the alleged sexual offenses until March 2002. The complainant also testified that, to his knowledge, no one ever saw him and defendant in defendant's bedroom. Additionally, contrary to what defendant argues, the record reflects that defense counsel was allowed to ask the complainant if he knew whether defendant had ever "touched [the complainant's] brothers."

Also, defendant argues that the trial court improperly precluded defense counsel from impeaching the complainant with his preliminary examination testimony that the sexual acts did not begin on the first night, as he claimed at trial, and that he reported defendant because he refused to help him. But the jury was aware that the complainant wavered regarding the date that the sexual offenses began. Additionally, defendant brought out, through his cross-examination, that the complainant reported defendant because he "refused to help him." Although defense counsel sought to specifically illustrate that the complainant had accused defendant because defendant refused to give him money, the preliminary examination testimony cited by defense counsel did not state that premise.

Defendant also claims that the trial court improperly prohibited defense counsel from exploring the complainant's use of drugs, particularly since the complainant blamed his drug addiction on defendant's acts. Although the trial court initially precluded any inquiry regarding the complainant's drug use before 1971 and after 1973, the trial court subsequently allowed defense counsel to question him about when he started using drugs, as well as the types of drugs he used. As a result of defense counsel's inquiry, the complainant testified that he began using marijuana at age sixteen, cocaine at age twenty-three, and was using both marijuana and cocaine in 2000 and 2001.

We also conclude that defendant's suggestion that the trial court's evidentiary rulings deprived him of his constitutional right to present a defense is without merit. The trial court's rulings did not amount to a blanket exclusion of all evidence challenging the complainant's credibility. In fact, defense counsel cross-examined the complainant at length, and specifically and effectively raised questions regarding his truthfulness, motivations to falsely testify, and failure to report the alleged offenses sooner. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Therefore, we are not persuaded that the trial court abused its discretion by making the challenged evidentiary rulings.

VIII. Michigan's Sex Offenders Registration Act

Defendant's final claim is that Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is unconstitutional. We disagree.

Constitutional issues are reviewed de novo. *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002). "Statutes are presumed constitutional, and courts must construe statutes as constitutional unless the unconstitutionality of a statute is clearly apparent." *Id.* A statute may not be declared unconstitutional simply because it is undesirable, unfair or unjust. *Id.* at 561-562.

Defendant argues that the SORA's failure to condition registration on a finding of dangerousness and provide for a hearing on that issue violates procedural due process. As noted by plaintiff, this Court and the United States Supreme Court have already rejected similar constitutional challenges. *Connecticut Dep't of Public Safety v Doe*, 538 US 1; 123 S Ct 1160; 155 L Ed 2d 98 (2003); *In re Wentworth*, *supra*. Furthermore, the primary case on which defendant relies, *Fullmer v Michigan Dep't of State Police*, 207 F Supp 2d 650 (ED Mich, 2002), was reversed by the Sixth Circuit Court of Appeals in *Fullmer v Michigan Dep't of State Police*, 360 F3d 579 (CA 6, 2004).

In *Fullmer*, the defendant argued that the SORA deprived him of notice and an opportunity to be heard on the issue of his dangerousness or threat to public safety. *Id.* at 581. In concluding that the SORA was not unconstitutional, the Sixth Circuit relied on the United States Supreme Court's decision in *Doe*, *supra* at 7-8, wherein the Court held that a determination of the dangerousness of an offender was not a material issue with respect to Connecticut's sexual offender registry, and that the registration is based on conviction alone. The Supreme Court therefore concluded that Connecticut's sexual offender registration act did not violate the Due Process Clause based on its failure to require an analysis of an offender's dangerousness. *Id.* In *Fullmer*, the Sixth Circuit concluded that Michigan's registry serves the same purpose and has the same effect as its Connecticut counterpart. *Fullmer, supra* at 582. The Sixth Circuit determined that Michigan's SORA was not unconstitutional under the Fourteenth Amendment in light of the Supreme Court's holding in *Doe*, and the similarity between the Michigan and Connecticut statutes. *Fullmer, supra* at 582-583.

In light of the foregoing authorities, there is no merit to defendant's argument that the SORA is unconstitutional because it does not require a finding of dangerousness or hearing on that issue. Furthermore, defendant's general, cursory claims that *Doe* should not apply, and that the circumstances of this case "should not subject" the seventy-year-old defendant "to the

punishment, constrictions, and indignities of this statute," do not provide a basis for relief. As previously indicated, a statute may not be declared unconstitutional simply because it is seen as undesirable, unfair or unjust. *In re Wentworth*, *supra*.

Defendant also argues that the SORA interferes with his liberty interests of "the right to privacy, the right to travel, and the right to obtain employment." In *In re Wentworth*, *supra* at 563-566, a case involving a juvenile offender, this Court held that the SORA does not implicate due process rights, particularly, that the act does not deprive offenders of liberty or privacy interests. In reaching this conclusion, the Court adopted the following language from *Lanni v Engler*, 994 F Supp 849, 855 (ED Mich, 1998), a case involving a parolee's procedural due process challenge to the SORA:

> The Act merely compiles truthful, public information and makes it more readily available. To the extent that plaintiff may suffer injury to his reputation or loss of employment opportunities, such injuries are purely speculative on the present record. Moreover, this Court finds that any detrimental effects that may flow from the Act would flow most directly from plaintiff's own misconduct and private citizen's reaction thereto, and only tangentially from state action.

The *Lanni* Court also found that the defendant could not prove deprivation of a liberty or property interest. *Id*. Given the decision in *In re Wentworth*, and the language adopted therein, there is no merit to defendant's claim that the SORA violates liberty interests.

IX. Conclusion

We reverse the trial court's order denying defendant's motion for an evidentiary hearing on the basis of juror misconduct, and remand for an evidentiary hearing in which defendant may present evidence regarding whether (1) he was actually prejudiced by the presence of the juror in question, or, whether (2) the juror was properly excusable for cause. *Crear*, *supra* citing *Daoust*, *supra* at 9. We affirm in all other respects. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Pat M. Donofrio